SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 52

MAKAH INDIAN TRIBE,
as a tribe and as a Federal corporation,
on its own behalf and on behalf of each of its members,
Appellants,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees,*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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ON APPEAL FROM THE SUPREME COURT OF
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JURISDICTIONAL STATEMENT

This case involves the constitutionality of a state regulation taxing merchandise earmarked for sale in Indian commerce. In this sense, the case is the sequel to *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). Specifically this case involves the constitutionality of the Washington State Cigarette Tax as applied to cigarettes sold in Indian commerce on the Makah Indian Reservation in the State of Washington.

Appellant, The Makah Indian Tribe, appeals to the Supreme Court of the United States from the judgment

of the Washington Supreme Court issued January 2, 1968. (Appendix C) The Makah Indian Tribe submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 72 W.2d 608, 434 P.2d 580 (1967), and is reprinted as Appendix A. The Superior Court's decision is not reported but is reprinted as Appendix B. The judgment appealed from (being the Remittitur) is reprinted as Appendix C.

JURISDICTION

On September 9, 1965, the Makah Indian Tribe filed a Complaint in the Superior Court of the State of Washington for Thurston County, seeking a declaratory judgment pursuant to Revised Code of Washington, Chapter 7.24 (the Uniform Declaratory Judgments Act), and a permanent injunction pursuant to Revised Code of Washington, Chapter 7.40.

The action resulted from the Washington State Tax Commission Letter Regulation of July 20, 1965, imposing the Washington Cigarette Tax, established in Revised Code of Washington §§ 82.24.020, 73. 32. 130 and 28.47.-440, upon all cigarettes sold at retail to Indians on reservations in the State of Washington.

The action was brought in order to secure a declaration that the Washington Cigarette Tax as applied is invalid as a violation of Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261.

On September 9, 1965, at the time of filing of its Com-

int (R.3), the Makah Indian Tribe obtained a Re-
ining Order and Order to Show Cause (R.10) which
rained the Tax Commission from levying taxes on
arettes sold at retail to the Makah Indian Tribe or any
its members on the Reservation and required the Tax
nmission to notify wholesalers of such cigarettes that
y would not be taxed and need not bear cigarette tax
mps until further notification. The Order to Show
ıse required the Tax Commission to appear and show
se on September 20, 1965, why the Restraining Order
uld not be made permanent.

On September 15, 1965, the Superior Court entered an
ler Revising Act of Court Commissioner (R.18) which
vided that the restraint and notice requirements of the
lier Order be vacated.

On October 4, 1965, hearing was held upon the earlier
ler and on October 5, 1965, the Superior Court en-
ed a Memorandum Opinion (R.24) denying the Makah
ian Tribe's application for a temporary injunction to
tinue the provisions of the Restraining Order until the
e of trial.

On October 27, 1965, the Superior Court tried the mat-
and rendered an oral decision (Appendix B) adverse
the Makah Indian Tribe.

On December 13, 1965, the Makah Indian Tribe filed a
ely Notice of Appeal. (R.100)

On November 30, 1967, the Washington Supreme Court
med the Superior Court and rendered a written
nion. (Appendix A)

On January 2, 1968, the Washington Supreme Court
ed its Remittitur to the Superior Court containing the

Judgment enforcing the written opinion of the Washington Supreme Court entered November 30, 1967. Revised Code of Washington §2.04.170, Supreme Court Administrative Rule 15.

On February 21, 1968, the Makah Indian Tribe filed, in the Washington Supreme Court, a Notice of Appeal from the Remittitur to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review this Judgment by appeal is conferred by 28 U.S.C. § 1257 (2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

"Statute of any state" as used in the quoted statute has been held by the Supreme Court to include legislative orders of bureaus of state government given constitutional or statutory sanction, as in this case. *Hamilton v. Regents of the University of California* 293 U.S. 245, 258 (1934); *Sultan Ry. & Timber Co. v. Department of Labor and Industries of State of Washington* 277 U.S. 135, 136 (1928); *Live Oak Water Users' Ass'n v. Railroad Commission of State of California* 269 U.S. 354, 356 (1926).

The following decisions further sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685, 686 (1965); *Central*

. *Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 608 1962); *Memphis Steam Laundry Cleaner v. Stone,* 342 .S. 389 (1952); *Eureka Pipe Line Co. v. Hallanan,* 257 .S. 265, 269, 270, 271 (1921); *Dahnke-Walker Milling o. v. Bondurant,* 257 U.S. 282, 288, 289 (1921); *Mer-hants' Nat. Bank v. Richmond,* 256, U.S. 635, 637 1921).

STATUTES AND REGULATIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Con-itution, found at United States Code, Constitution, page 9, provides in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The following provision of the United States Code is aterial:

19 Stat. 200 (1876), 25 U.S.C. § 261, found at United tates Code, Title 25, page 189, provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The following provisions of the Revised Code of Wash-ngton establish the Washington Cigarette Tax:

Revised Code of Washington §82.24.020, found at aws, Extraordinary Session, 1965, ch. 173, § 23, page 764, provides:

> "There is levied and there shall be collected as

hereinafter provided, a tax upon the sale, use, consumption, handling or distribution of all cigarettes, in an amount equal to the rate of four mills per cigarette."

Revised Code of Washington §73.32.130, found at Laws, 1959, ch. 272, § 2, page 1275, provides in part:

> "In addition thereto, there is hereby levied and there shall be collected by the tax commission from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one mill per cigarette . . ."

Revised Code of Washington §28.47.440, found at Laws, Extraordinary Session 1955, ch. 3, §5, page 1723. provides in part:

> "In addition to the taxes levied by RCW 73.32.130 and 82.24.020, there is levied and shall be collected by the tax commission from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one-half mill per cigarette . . ."

The Washington State Tax Commission Letter Regulation of July 20, 1965 provides:

> "To: "Date: July 20, 1965
>
> "Subject: Cigarette Tax on Sales to Indians
>
> "The Tax Commission has recently learned of several instances in which Indians conducting businesses upon Indian Reservations are selling cigarettes to which the State of Washington Cigarette Stamps have not been affixed. There is evidence that such unstamped cigarettes are being sold to both Indians and non-Indians.

"You are hereby informed that the sale, handling or distribution of cigarettes by Washington distributors to Indians, including sales for resale on an Indian Reservation, are subject to the Cigarette Tax of 11 cents per package. Distributors and wholesalers of cigarettes will be liable for purchasing and affixing the required stamps upon all cigarettes so sold, and upon failure to do so will become liable for the penalties provided in RCW 82.24.110, 120 and 130.

"In support of this ruling, your attention is directed to RCW 82.24.080: 'It is the intent and purpose of this Chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, *handled, or distributed within this state and to collect the tax from the person who first* sells, uses, consumes, *handles or distributes them in the state.*' (underscoring supplied)

"This ruling does not affect the exemption allowed in respect to sales made directly to U.S. Government departments or agencies nor in respect to sales made in interstate or foreign commerce.

"Since this matter has not been ruled on previously by the Tax Commission, the tax will be applicable prospectively from the date of this bulletin and will not apply in respect to any prior transactions."

TAX COMMISSION OF THE STATE OF WASHINGTON (R.94)

Related statutes and regulations involved in this appeal are as follows:

31 Stat. 1066 (1901), 32 Stat. 1009 (1903), R. S. § 2132, 22 Stat. 179, (1882), 25 U.S.C. §§262-264.

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958)

Laws, 1961, ch. 15 §82.24.010 – 120, pp. 969-973, §82.24.220, p. 977, §82.24.900, p. 977, §82. 32.300, p. 997. Revised Code of Washington §§82.24.010 – 120, .220, 900; §82.32.300.

All of the foregoing are printed in full as Appendix D.

QUESTION PRESENTED

The Washington Supreme Court has construed Revised Code of Washington, §§82.24.020, 73.32.130 and 28.47.-440 and the Washington State Tax Commission Letter Regulation of July 20, 1965, as imposing the Washington Cigarette Tax upon cigarettes sold at retail to Indians on reservations in the State of Washington.

The basic question presented is:

> Whether Revised Code of Washington, §§82.24.-020, 73.32.130 and 28.47.440 and the Washington State Tax Commission Letter Regulation of July 20, 1965, as applied, are invalid as being repugnant to and in violation of that portion of Article 1, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes;" and 25 U.S.C. §261.

STATEMENT OF THE CASE

Washington has had a cigarette tax since 1935. For thirty years, from the time of its enactment until 1965, the Washington Cigarette Tax was not imposed upon cigarettes sold at retail to Indians on reservations in the state of Washington. (Appendix A-4)

The Makah Indian Tribe comprises approximately 700 enrolled Makah Indians who reside on the Makah Indian Reservation in the state of Washington. The tribe is a federal corporation, organized under the Indian Reorganization Act of 1934. Members of the tribe who smoke are served by nine retailers on the Reservation who sell cig-

arettes by the package or carton to the general public. Ownership of the retail outlets is part Indian, part non-Indian. (Ex. Stipulation of Facts, R.92)

Throughout the years, the Washington Cigarette Tax has been increased through legislative amendment. In early 1965, the tax was raised from seven cents per package to eleven cents per package, effective June 1, 1965. Thereafter, Indians on the Colville Reservation in the state of Washington, set up a roadside stand, advertising and selling tax-free cigarettes at retail to all purchasers, both Indian and non-Indian. Following vehement and adverse newspaper publicity, the Washington State Tax Commission issued its Letter Regulation of July 20, 1965, instructing all cigarette wholesalers in the State of Washington to affix cigarette tax stamps in the amount of eleven cents per package to all cigarettes sold, handled or distributed to Indians for resale on Indian reservations in the state of Washington. (Ex. Stipulation of Facts, R.95)

Wholesalers selling cigarettes to retailers on the Makah Indian Reservation received the Letter Regulation and thenceforth supplied the retailers only with cigarettes to which cigarette tax stamps had been affixed, collecting from each retailer the exact amount of the tax represented by the stamps, viz., eleven cents per package. The retailer in turn collected the eleven cents per package from each cigarette purchaser on the Makah Indian Reservation, whether Indian or non-Indian. (Ex. Stipulation of Facts, R.95)

During the entire period from 1935 through 1965, the Commissioner of Indian Affairs was vested with sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations gov-

erning their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 25 U.S.C. §§261-264. Pursuant to his authority, the Commissioner of Indian Affairs prescribed detailed rules and regulations governing Indian traders. 25 C.F.R. §251

On September 9, 1965, the Makah Indian Tribe brought an action for declaratory judgment and permanent injunction in the Superior Court of the State of Washington for Thurston County. Upon trial of the matter, the Superior Court held against the Makah Indian Tribe, basing its opinion upon the following reasoning:

> "The Court is therefore of the opinion that the injunction will not lie in this matter. The Court will dismiss this action on the basis that this is a remote tax, it is not a direct tax upon the Indians in this matter, and is therefore not covered by the commerce clause of the United States or by any actions of Congress in relation thereto and, of course, the Court finds no violation of the State Constitution as such." (Appendix B-5)

The Makah Indian Tribe appealed to the Washington Supreme Court which affirmed the opinion of the Superior Court. The Washington Supreme Court held:

> "The trial court concluded that the tax complained of is not such a burden upon commerce with the Indian tribes as to violate article 1, section 8, clause 3 of the United States Constitution; that the incidence of the tax occurred outside of any Indian reservation and prior to the entry of the cigarettes into Indian commerce; and that its effect upon the Makah tribe, or any of its members, is 'too indirect and remote to render it unconstitutional'.
>
> "We are in accord with the findings and the conclusions of the trial court. The judgment is affirmed." (Appendix A-5).

HOW THE FEDERAL QUESTION WAS PRESENTED

The Makah Indian Tribe's Complaint:

The Makah Indian Tribe's Complaint set forth verbatim the Letter Regulation of July 20, 1965, which imposed the Washington Cigarette Tax (comprising the three taxes established by Revised Code of Washington §§82.24.020, 73.32.130 and 28.47.440) upon cigarettes sold on the Makah Indian Reservation, and alleged that it:

> "violates the Constitution of the United States and Federal Statutes and the Constitution of the State of Washington." (R.5)

The Complaint further alleged that:

> "all cigarettes presently being sold on the Makah Indian Reservation have been illegally taxed pursuant to the letter regulation...." (R.5)

and prayed that:

> "1. The court enter judgment declaring that goods and services sold to the Makah Indian Tribe or any of its members on the Makah Indian Reservation are not subject to taxation by the State of Washington or any governmental agency thereof.
>
> "2. The court issue a restraining order pending a preliminary hearing, a temporary injunction upon such hearing and a permanent injunction upon trial of this matter, each restraining and enjoining defendants and each of them from levying tax upon cigarettes sold to the Makah Indian Tribe or any of its members on the Makah Indian Reservation, Washington." (R.5)

Oral Decision of Superior Court of Washington:

The Superior Court granted judgment in favor of the

Washington State Tax Commission, upholding the validity of the Letter Regulation of July 20, 1965, by finding that imposition of the tax did not violate the Constitution of the United States or Federal statutes.

The Makah Indian Tribe's Brief to the Washington Supreme Court:

On appeal to the Washington Supreme Court, the Makah Indian Tribe, through assignments of error and argument, renewed its position that the Washington Cigarette Tax, as applied through the Letter Regulation of July 20, 1965, constituted a violation of Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261. In its brief, the Makah Indian Tribe's proposition of law number 3 stated specifically:

> "The Washington Cigarette Tax, as applied in the instant case, unconstitutionally regulates Indian commerce, a field pre-empted by Congress." (R.96, p. 8).

Discussion under the quoted proposition of law in the brief concluded as follows:

> "Accordingly, under the *Warren* rule the tax constitutes a direct and precisely measurable financial burden upon Indian commerce in violation of Article I, Sec. 8, of the Constitution of the United States, and 25 U.S.C. Sec. 261." (R. 96, p.10).

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented is whether a state can tax merchandise specifically earmarked for Indian commerce, by requiring that the tax be paid prior to the arrival of the merchandise within the boundary of the Reservation. Such state action is in direct violation of Article I, Section 8, Clause 3 of the Constitution of the United States, 25

U.S.C. §261 and the holding of the Supreme Court in *Warren Trading Post Company v. The Arizona State Tax Commission,* 380 U.S. 685 (1965).

The Washington Cigarette Tax, as extended to Indian commerce by the State Tax Commission's 1965 regulation, achieves the purpose of state taxation of Indian commerce while purporting to be a tax on off-reservation merchandise. This is made clear by the sequence of events leading to the imposition of the tax on July 20, 1965.

First, the Washington State Legislature raised the tax from seven cents to eleven cents per package effective June 1, 1965, and thus made it profitable for non-Indians to purchase untaxed cigarettes on Washington Indian reservations. Then Indians on the Colville Indian Reservation, in the State of Washington, set up a roadside stand, advertising and selling untaxed cigarettes at retail to all purchasers, both Indian and non-Indian. Finally, the Washington State Tax Commission, faced with the seemingly insurmountable problem of enforcing payment of the tax by non-Indians purchasing cigarettes on the Colville Indian Reservation, seized upon the wording of Revised Code of Washington §82.24.080, making the Washington Cigarette Tax incident not only to cigarettes "sold, used," or "consumed" in the state, but also to those "handled or distributed" in the state. The broad language of the statute promised not only a method of enforcing collection of the tax from non-Indians but more importantly a method of avoiding federal pre-emption of Indian commerce and enforcing collection of the tax from all Indians on reservations in the State of Washington.

The thinking of the Washington State Tax Commission is apparent from the first paragraph of the Letter Regulation of July 20, 1965, which states:

> "The Tax Commission has recently learned of several instances in which Indians conducting businesses upon Indian Reservations are selling cigarettes to which the State of Washington Cigarette Stamps have not been affixed. There is evidence that such unstamped cigarettes are being sold to both Indians and non-Indians."

The obvious and intended consequence of the Letter Regulation was to raise the price of cigarettes to retailers on the Makah Indian Reservation and to members of the Makah Indian Tribe by eleven cents per package—the wholesaler collects eleven cents more per package from the retailer; the retailer eleven cents more from the Indian purchaser.

It is not contended by the Washington State Tax Commission that the eleven cents increase in the retail price of cigarettes on the Makah Indian Reservation was due to any economic factor other than imposition of the tax. Quite the contrary, the sole and direct cause of the price increase was the affixing of cigarette tax stamps pursuant to the Letter Regulation of July 20, 1965.

If the State of Washington may collect a tax on cigarettes sold to Indians on their reservations by collecting the tax from the wholesaler even where the cigarettes are earmarked for shipment to the reservations, then the state may accomplish all of the results which the Supreme Court held could not be accomplished in the *Warren* case, and the doctrine of federal pre-emption of Indian commerce is robbed of its effectiveness. Parenthetically, it should be noted that the sale of untaxed cigarettes by Indians to non-Indians is a problem which can be dealt with administratively by the Commissioner of Indian Affairs without legitimizing state interference with Indian commerce.

y the broad wording of Revised Code of Washington
2.24.020, 73.32.130 and 28.47.440, the Washington
arette Tax is incident to any of the following activi-
: sale, use, consumption, handling or distribution of
arettes. The tax ultimately collected from the Indian
arette consumer on the Makah Indian Reservation
d ostensibly incident to wholesale activity off the
kah Indian Reservation) is eleven cents per package,
same as the tax ultimately collected from the non-
ian cigarette consumer elsewhere in the state (and
dent to sale, use, or consumption of cigarettes).

The question must be asked, "Why cigarettes? Why not
s and butter? Why may the State of Washington not
ase its retail sales tax in the alternative, as is the Wash-
ton Cigarette Tax, make the tax incident to "sale, use,
sumption, handling or distribution" of all merchandise
the State of Washington, and thus effectively levy its
il sales tax upon all Indian commerce on Washington
lian reservations?"

Absolutely no reason, logical or legal, can be conjured
to prevent the State of Washington from doing so. If
Washington Cigarette Tax as applied in the instant
e does not constitute a burden upon Indian commerce,
State of Washington is free to burden Indian com-
rce to any extent it choose merely through the device
phrasing the appropriate statute in the alternative. This
e constitutes, then, a direct conflict between the desire
the State of Washington to tax Indian commerce and
eral pre-emption of Indian commerce.

The reasoning of the Washington Supreme Court in
; case dangerously misconstrues the extent of and
losophy underlying federal pre-emption of Indian com-
rce. Jurisdiction of the United States over Indian com-

merce is exclusive and absolute. "Indian commerce" was defined by the Supreme Court of the United States in *United States v. Holliday*, 70 U.S. 407 (1865) as follows:

> "And so commerce with the Indian tribes, means commerce with the individuals composing those tribes."

Congress' power over Indian commerce is "exclusive and absolute" and applicable to Indian commerce conducted wholly within a single state, or wholly outside an Indian reservation. *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876).

Pursuant to its constitutional authority, Congress has enacted comprehensive federal regulations over Indian commerce.

25 U.S.C. §261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

In the *Warren* case, the Supreme Court made it crystal clear that federal pre-emption of Indian commerce is predicated *only* upon a philosophy of protecting Indians. In the *Warren* opinion, Mr. Justice Black stated at p. 169:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income

would put financial burdens on appellant *or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up *in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.*" (Emphasis supplied)

If the decision appealed from is allowed to stand, not only the State of Washington but each other state of the 25 states containing Indian reservations in which 471,938 Indians reside[1], will be encouraged to burden Indian commerce with state taxes as in this case. For in the instant case, the tax impact on the Indian commerce is not at all in doubt. In the *Warren* case, the Arizona tax was not tied to any single item of merchandise but was general and merely measured by gross receipts of the retailer, whereas the Washington tax is precisely determined at eleven cents per package of cigarettes. Thus while the Arizona tax, in the words of the Supreme Court "could" disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner, the Washington tax *definitely* does so. The ramifications of this case, then, are nationwide and as broad and important as Indian commerce itself.

This case is appealed pursuant to 28 U.S.C. §1257(2) from the highest court of the State of Washington, the Washington Supreme Court. Article IV, Sections 1, 2, 3, 4, Constitution of the State of Washington. The appeal is taken from the Washington Supreme Court's Remittitur, which constitutes the final judgment of the Washington Supreme Court, and which became effective as of its date of entry, January 2, 1968. It is not subject to further

[1] *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

correction or review since it stems from a decision en banc. Revised Code of Washington §2.04.170 states in pertinent part:

> "... and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc shall become final thirty days after its filing, unless during such period a petition for rehearing be filed, ... Whenever a decision shall become final as herein provided, a judgment shall issue thereon."

The decision of the Washington Supreme Court affirmed the decision of the Superior Court of Washington in and for Thurston County. Both courts sustained the validity of imposition of the Washington Cigarette Tax against the contention of the Makah Indian Tribe that it violated Article I, Section 8, Clause 3 of the Constitution of the United States and 25 U.S.C. §261. Both courts based their opinions solely upon federal grounds (Appendices A and B). The raising of the federal question was timely and it was so presented as to qualify for an appeal pursuant to 28 U.S.C. §1257(2). *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

CONCLUSION

This appeal raises the important federal question whether federal pre-emption of Indian commerce can be avoided by the states through indirection. The question is substantial and for proper resolution and plenary consideration requires briefs on the merits and oral argument. Determination of this matter is necessary to maintain the comprehensive federal scheme of regulation of Indian commerce and ultimately to protect Indians against prices deemed unfair and unreasonable by the Indian Commissioner.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of Washington of November 30, 1967

The Makah Indian Tribe seeks to enjoin the application of the Washington state cigarette tax to cigarettes sold by wholesalers to retail outlets doing business on the Makah Indian Reservation. It is argued that by so applying the tax the state of Washington has interfered with Indian commerce in violation of the U.S. Const. art. 1, § 8, clause 3, which gives to the Congress the power "To regulate commerce . . . with the Indian tribes."

The trial court refused to grant the injunction and the Makah Indian Tribe appeals.

This tax, collected from wholesalers within the state of Washington, amounts to 11 cents upon each package of 20 cigarettes.[1] The tax is paid through the purchase of stamps from the Tax Commission, and such stamps in an appropriate amount must be attached to each package of cigarettes before the wholesaler distributes the same.

It is noted that, in its practical application, the Washington cigarette tax applies to and is paid by the wholesalers who distribute the cigarettes to retail outlets for resale. At the time the tax is paid and the tax stamps evidencing payment are affixed to a package, the cigarettes are the inventory of non-Indian wholesalers[2] conducting their business activities wholly outside of any Indian reservation; the cigarettes have neither been

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[1]The tax is made up of three separate taxes:

4 mills per cigarette as a tax "upon the sale, use, consumption, handling or distribution of all cigarettes." RCW 82.24.020.

1 mill per cigarette to be credited to the war veterans' compensation fund. RCW 73.32.130.

½ mill per cigarette to be credited to the public schools building bond redemption fund. RCW 28.47.440.

[2]Most of the wholesalers involved were located in Port Angeles, Washington.

specifically identified as those to be sold on an Indian reservation nor as those to be sold at retail to Indians.

We do not think this application of the tax can in any way be said to infringe upon the federal scheme of regulation and protection of Indian commerce.

Appellant contends, however, that even if the tax is not imposed directly upon Indian commerce, its ultimate effect of increasing the retail price of cigarettes paid by members of appellant tribe renders it an impermissible intrusion upon Indian commerce.

Our research has uncovered no case where the sphere of federal regulation of Indian commerce has been so widely drawn as to proscribe every state tax imposed anywhere along the progression from production to consumption which, as one of its ultimate results, increases the price paid by the consumer, whether Indian or non-Indian and whether on or off an Indian reservation. Were that the case, scarcely any tax which could be found to affect the ultimate consumer price of products sold upon Indian reservations would be free from the challenge that it interfered with the Congress' exclusive control of Indian trading on Indian reservations.

We think the states are prohibited only from imposing taxation which so directly regulates or substantially encumbers the area of Indian trading on Indian reservations as to represent interference with the federal policy of careful control and protection of Indian trade.

A statement made in *Minot v. Philadelphia, Wilmington & Baltimore R.R.*, 85 U.S. (18 Wall.) 206, 232 (1873), referring to the congressional power over interstate commerce, is instructive here.

> "The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses at-

tendant upon the use or possession of the thing taxed.

> "That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed by this court in a recent case. 'Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.'"

The facts of this case distinguish it from *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 14 L.Ed.2d 165, 85 Sup.Ct. 1242 (1965) relied upon by the appellant. The difference is apparent.

The Arizona tax which was successfully challenged in that case was applied directly to the "gross proceeds of sales, or gross income" of *federally licensed* Indian traders subject to a detailed scheme of regulations and restrictions promulgated by the Commissioner of Indian Affairs pursuant to congressional legislation. Those regulations, as specifically noted in a footnote to the opinion, are applicable only to activities on Indian reservations. The United States Supreme Court held that

> Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, these state laws imposing taxes cannot stand. (p. 691)

Footnote 18, at page 691 of the opinion, indicate the basis for the ruling was that,

> Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate *on the subject*. (Italics ours)

The opinion further explained:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation

> Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. (p. 691)

We think the portions of the *Warren* opinion we have cited above indicate that the fatal feature of the Arizona tax statute was that it was directed specifically at and had a substantial effect upon reservation trading, an area which there had been fully occupied by federal legislative and administrative legislation.

The *Warren* ruling is not apposite here for the reason that the tax here involved does not represent state legislation "on the subject" of Indian trading, but rather upon the subject of the wholesale distribution activities carried on wholly outside of any Indian reservation.

The unfortunate circumstance of this case is that for years the Tax Commission of the state of Washington did not require the payment of the tax by wholesalers on cigarettes sold to retailers on the Makah Indian Reservation. (This was also true of other Indian reservations in the state.)[3] When the Tax Commission issued a letter regulation on July 20, 1965, requiring wholesalers to pay the tax and affix the stamps upon cigarettes sold to retailers on Indian reservations, it may have seemed that another of the inalienable rights of the Indians had been violated. We see no wrongful intervention with Indian rights or Indian commerce, but only the belated insistence that the law was applicable to cigarettes being sold by wholesalers to retailers, whether the latter were on or off Indian reservations.

The trial court found, and there was no exception to the finding,

> Neither the plaintiff Tribe nor any of its members are cigarette wholesalers. The tax on cigarettes is not collected by the State of Washington from the Makah Tribe or from any members of that Tribe. It is

[3]This covered a period of some 30 years, from the first imposition of cigarette taxes in 1935 until July 20, 1965.

collected only from wholesalers and distributors as a result of their doing business outside the boundaries of any Indian reservation. (Finding No. 5)

The trial court concluded that the tax complained of is not such a burden upon commerce with the Indian tribes as to violate article 1, section 8, clause 3 of the United States Constitution; that the incidence of the tax occurred outside of any Indian reservation and prior to the entry of the cigarettes into Indian commerce; and that its effect upon the Makah tribe, or any of its members, is "too indirect and remote to render it unconstitutional."

We are in accord with the findings and the conclusions of the trial court. The judgment is affirmed.

ALL CONCUR.

APPENDIX B

Oral Decision of the Superior Court of the State of Washington, Thurston County October 27, 1965

Well, of course, as counsel knows this is an unusual case. Neither counsel have cited in the Court's opinion any case directly in point concerning the matter.

The first problem that the Court is concerned with, of course, is the status to be sued. Can the Makah Indian Tribe as a corporation sue in this matter representing each of its members? Now, this has given the Court some concern and there have been no cases cited. The rules of Practice and Procedure have been cited.

By the Stipulation of Facts—the Court was concerned prior to the Stipulation of Facts as filed here—and I presume that counsel meant this that in the Stipulation of Facts it is conceded that there are certain Makah Indians who are buying these cigarettes at eleven cents additional per pack; therefore, they have gotten over one hurdle the Court was facing which was as to whether there would be any proof. The Court now does not have to worry about having to take judicial notice of the fact that there would be Makah Indians that were smoking. It would appear by the Stipulation of Facts that has been satisfied.

Now, the Court is of the opinion as a result of the power invested in the Makah Indian Tribe and into the commerce clause of the United States Constitution whereby they use the term "tribe" and where it is alleged that this action is brought on the basis of rights accruing to the Indians pursuant to the commerce clause of the United States Constitution and also the stipulation that the Makah Indian Tribe is a Federal corporation representing all Indians of the Indian Tribe; the Court is going to hold at this time that the Makah Indian Tribe as a Federal corporation has the right to sue on behalf of the Makah Indians in this matter.

Now, there have been several arguments by the defendants in this matter that they have no standing under the declaratory judgment to bring this action, but when these facts are argued as to whether they have no right because this is a remote tax, it is not a tax directed at them, we still get back to the merits because if under the facts and merits of this case—regardless of the fact that this tax may be upon a wholesaler outside the Indian Reservation—but if in the merits it is shown that this violates the commerce clause of the Constitution as to the rest of the Indian tribe or violates any of the Federal statutes passed pursuant thereto, then they have a standing to be in Court. On that basis the Court will not dismiss this action, but will then go to the merits of the matter.

Now, of course, the most recent case is the *Warren Trading Post Company* case, but in reading the *Warren Trading Post* case very carefully, the Court is of the opinion that although this reiterates as stated by the defendants' counsel the law in the United States as to commerce on the Reservation, the Court does not feel that the *Warren Trading Post* case answers the question which is before the Court at this time: The problem as to whether either the commerce clause of the United States Constitution or the laws as passed by Congress pursuant to the power given them under the commerce clause has gone so far as to cover this situation where the tax is imposed on a wholesaler outside the Reservation and where then he sells to a retailer or factor on the Reservation.

Now, Plaintiff argues that the Bureau of Indian Affairs by their rules and regulations and by the powers given them, and he argues by inference that he has the right to control the quality and price of goods sold to the Indians.

Now, the Court in its study of these cases and in the *Warren Trading Post* case has never found a case where there is any rule or regulation or any case where the Bureau of Indian Affairs has attempted to look to the

quality and price of the goods of a wholesaler selling to a factor on the Indian Reservation. It would appear that those rules and regulations in the mind of the Court were applied to the factor to protect the Indians from high prices and poor goods sold by the factor or trader directly to the Indians.

The real question the Court feels in this case is to whether commerce with the Indians extends to a wholesaler living and doing business off the Reservation. The Court has been unable as he previously stated to find any cases in point.

Now, there has been some criticism or some argument made as to the type of tax which is imposed in this matter which the Court should comment on. It is the Court's opinion that although the terms "sale, sale use, wholesaling, handling" is used, that these were catchalls to cover all possibilities as far as being assured that this tax was paid, and that by the Stipulation of Facts, in this State actually the burden of paying, not collecting, but paying this tax has fallen upon the wholesaler in the State of Washington, and that the wholesaler has the right to decide whether he will pass this on.

Now, the Court does not mean to be naive. In this eleven cents tax on each pack of cigarettes, the Court is going to have to presume the wholesaler will pass this tax on, but by that very fact it is hard for the Court to see how this tax as paid by the wholesaler can be said to be a tax directly on Indian commerce.

It certainly cannot be said as a matter of fact when the wholesaler pays that tax on a pack of cigarettes that he has to sell whether he knows where each cigarette is going to be sold and that those cigarettes will be sold in Indian commerce at that time.

Now, the only case the Court can find that relates to the possible philosophy of a person who may be immune from a tax either by Federal statute or by Constitution is the case of Alabama versus King and Boozer, and al-

though only dealing with the sales tax and not dealing with Indians, the Supreme Court of the United States has held that even though the tax was indirectly borne by the United States who actually was immune from that tax would be paid by the United States Government not to the State of Alabama but actually to the contractors to reimburse them for taxes which they had paid, and this is an indirect tax if you want to call it such.

An additional problem that was raised by the Defendant in this matter and not lightly taken by the Plaintiff was that for the Court to hold that the state cannot impose this tax on a wholesaler would mean that you are faced with the problem if this wholesaler had to pay the state this business and occupation tax and by some analysis it could be shown that there was a certain percentage per pack which would be attributable and to be collected from the Indians, and this would be a state tax, a wholesale and excise tax, or a sales tax, the Indians then would have the right to have this refunded. I don't mean to carry this to the extreme, but the Court can certainly see the difficulty of this type of philosophy in allowing this type of tax to be considered as a direct tax on the Indians and therefore a tax on Indian commerce.

The Court in reading the *Warren Trading Post* case is certain a limitation is placed by a wording by the United States Supreme Court which limited it only to factors who were licensed. This wasn't any unusual extension of the power of the factor himself who was governed by a licensing provision and by the laws laid down by the Congress pursuant to the commerce clause. They were actually governed by the United States Government through the Bureau of Indian Affairs and the Court held that by having taken jurisdiction over traders or factors that the state was interfering with Indian commerce by attempting to impose a tax upon the Warren Trading Post.

In this case we are not dealing with this situation at all. The Court has not been apprised of any legislation where the Congress of the United States Bureau of Indian

Affairs have ever attempted to regulate someone who was dealing in a wholesale capacity with a retail merchant or retail trader upon an Indian Reservation.

The Court is therefore of the opinion that the injunction will not lie in this matter. The Court will dismiss this action on the basis that this is a remote tax, it is not a direct tax upon the Indians in this matter, and is therefore not covered by the commerce clause of the United States or by any actions of Congress in relation thereto and, of course, the Court finds no violation of the State Constitution as such.

I might state in closing the only problem the Court can see in this as to anything else is probably the matter of the degree, and the Court will agree with counsel for the Plaintiff that in this matter the raising of the previous retail price to the Indians is large and whether the Court might take some consideration of the fact that this is so much of a raise that it might be considered as a tax on the Indians directly or indirectly, the Court has found no guideline and the Court does not feel without some guideline that the trial court in this matter can rule otherwise than it has. Therefore, the Court will sign the appropriate order and decree.

APPENDIX C

Remittitur

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 30, 1967, became the final judgment of this court in the above entitled case on January 2, 1968. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three Hundred Twenty-eight and 18/100 Dollars ($328.18) in favor of respondent and against appellant and its surety, Fidelity and Deposit Company of Maryland.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 2nd day of January, A.D. 1968.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

APPENDIX

APPENDIX D

Constitutional Provisions, Statutes and Regulations

United States Constitution, Art 1, §8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. §2132, 25 U.S.C. §§261-264:

§261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, §5, 19 Stat. 200.

§262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, §1, 31 Stat. 1066; Mar. 3, 1903, c. 994, §10, 32 Stat. 1009.

§263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian

tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. §2132.

§264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person, shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commission of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. 2133; July 31, 1882, c. 360, 22 Stat. 179.

Federal Regulations:

25 F.R. 10670-72 (1957); 30 F.R. 8267-8 (1965), 25 CFR §251 (1965):

§251.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§251.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe. R.S. 2132; 25 U.S.C. 263.

§251.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs. R.S. 2133, as amended; 25 U.S.C. 264.

§251.5 Government employees not to trade with Indians except in certain cases.

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June

19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided,* That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further,* That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States employees, Indian blood.* Indian employees of the United States Government of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other

way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ----------, ----------
(Name) (Title)
swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (Grantor's, purchaser's, vendor's) consent to the instant transaction. 53 Stat. 840; 25 U.S.C. 68a, 87a, 441.

§251.6 Small purchases.

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes. R.S. 2078; 25 U.S.C. 68.

§251.8 Regulating sale of arms and ammunition.

Arms and ammunition may not be sold to the Indians by traders except upon permission of the

superintendent, which will be granted only for clearly established lawful purposes.

§251.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendant.

(c) When a license or permit to trade is issued under the regulations in this Part 251, a fee of $5.00, payable when the license is issued, shall be levied against the licensee. 30 F.R. 8267, June 29, 1965

§251.11 License period.

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years. 30 F.R. 8268, June 29, 1965

§251.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§251.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§251.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§251.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§251.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§251.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§251.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the

trader to criminal prosecution, revocation of license and such other action as may be necessary.

§251.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§251.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§251.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservations, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§251.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§251.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Pay-

ment must be made in money, or in credit if the Indian is indebted to the trader.

§251.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§251.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

Revised Code of Washington:

§28.47.440

Additional tax on cigarettes imposed. In addition tion to the taxes levied by RCW 73.32.130 and 82.24.020, there is levied and shall be collected by the tax commissioner from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one-half mill per cigarette, but the provisions of RCW 82. 24.070 allowing dealers' compensation of affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 shall be allowed as compensation for their services in affixing the stamps for the ad-

ditional tax required by this section a sum equal to one-half of one percent of the value of the stamps for such additional tax purchased or affixed by them. Wholesalers and retailers subject to the payment of this tax may, if they wish, absorb such additional tax and not pass it on to purchasers without being in violation of this or any other act relating to the sale or taxation of cigarettes.

Revenues derived from the tax imposed by this section shall be transmitted by the tax commission to the state treasurer in accordance with the provisions of RCW 82.32.320, to the credit of the public schools building bond redemption fund. The amount so deposited in the aforesaid fund shall be devoted exclusively to payment of interest on and to retirement of the bonds authorized by RCW 28.47.420.

As additional security for the payment of the bonds herein authorized, all revenues derived from the tax imposed by RCW 82.24.020 over and above the amount required by RCW 73.32.130 to be paid into and retained in the war veterans' compensation bond retirement fund shall be paid into the public schools building bond redemption fund and shall be devoted exclusively to the payment of interest on and to retirement of the bonds authorized by RCW 28.47.420: *Provided,* That whenever the receipts into the public schools building bond redemption fund from all sources during any one year exceed two million two hundred and fifty thousand dollars, all sums received above that amount shall be transferred by the state treasurer to the state general fund.

§73.32.130

Cigarette tax authorized for bond interest and retirement—Segregation, transfer of funds—Dealer's compensation. For the purpose of creating the fund for the retirement of such bonds upon maturity and the payment of interest thereon as it falls due, all proceeds hereafter received from the excise tax on cigarettes imposed by chapter 82.24 as now or here-

after amended, shall, so long as any part of principal or interest of the bonds herein provided for remains outstanding, be paid into the war veterans' compensation bond retirement fund hereinafter provided for.

In addition thereto, there is hereby levied and there shall be collected by the tax commission from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling or distribution of cigarettes in an amount equal to the rate of one mill per cigarette, but the provissions of RCW 82.24.070 allowing dealers' compensation for affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 shall be allowed as compensation for their services in affixing the stamps for the additional tax required by this section a sum equal to one percent of the value of the stamps for such additional tax purchased or affixed by them.

All money derived from such tax shall be paid to the state treasurer and credited to a special trust fund to be known as the war veterans' compensation bond retirement fund, which shall be kept segregated from all money in the state treasury and shall, while any of the bonds herein authorized or any interest thereon remain unpaid, be available solely for the payment thereof.

Whenever the receipt into the war veterans' compensation bond retirement fund during any year exceed four million five hundred thousand dollars, all sums received above that amount shall be transferred by the state treasurer to the state general fund, and whenever there has accumlated in the war veterans' compensation bond retirement fund four million one hundred thousand dollars in excess of the amount required in any year, as determined by the state finance committee, to meet obligations during that year for bond retirement and interest, the state treasurer shall transfer from such fund to the general fund

all money in excess of such amount.

§82.24.010

Definitions. For the purposes of this chapter, unless otherwise required by the context:

(1) "Wholesaler" means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only;

(2) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate;

(3) "Retail selling price" means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state;

(4) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state;

(5) "Stamp" means the stamp or stamps or meter impressions by use of which the tax levy under this chapter is paid;

(6) The meaning attributed, in chapter 82.04, to the words "person," "sale," "business" and "successor" shall apply equally in the provisions of this chapter.

§82.24.020

Tax imposed—Rate

There is levied and there shall be collected as

hereinafter provided, a tax upon the sale, use consumption, handling or distribution of all cigarettes, in an amount equal to the rate of four mills per cigarette.

§82.24.030

Stamps to be affixed—Meter machines authorized. In order to enforce collection of the tax hereby levied, the tax commission shall design and have printed stamps of such size and denominations as may be determined by the commission, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the commission to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided*, That where it is established to the satisfaction of the commission that it is impractical to affix such stamps to the smallest container or package, the commission may authorize the affixing of stamps of appropriate denomination to a large container or package.

The commission may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto.

§82.24.040

Duty of wholesaler. Every wholesaler in this state shall immediately, after receipt of any of the articles taxed herein cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That any wholesaler engaged in interstate business, who fur-

nishes surety bond in the sum satisfactory to the commision, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the stamps required by this chapter. Such interstate stock shall be kept separate and apart from stamped stock: *Provided further,* That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, make a true duplicate invoice of the same which shall show full and complete details of the interstate sale or delivery, and shall transmit such true duplicate invoice to the main office of the commission, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this proviso the commission may revoke the permission granted to the taxpayer to maintain an interstate stock of goods to which the stamps required by this chapter have not been affixed.

§82.24.050

Duty of retailer. Every retailer shall, except as to those articles on which the tax has been paid by the proper affixing of stamps by a wholesaler, as herein provided, affix the stamps for the denomination and amount necessary to represent the tax on each individual package or container, the same to be done, in all cases, immediately upon receipt by the retailer of the unstamped articles: *Provided,* That any retailer engaged in interstate business, who furnishes surety bond in a sum satisfactory to the commission, shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the stamps required by this chapter. Such interstate stock shall be kept separate and apart from stamped stock: *Provided further,* That every retailer shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, make a true duplicate invoice of the same which shall show full

and complete details of the interstate sale or delivery, and shall transmit said true duplicate invoice to the main office of the commission, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this proviso the commission may revoke the permission granted to the taxpayer to maintain an interstate stock of goods to which the stamps required by this chapter have not been affixed.

§82.24.060

Stamps — How affixed. Stamps shall be affixed in such manner that they cannot be removed from the package or container without being mutilated or destroyed, which stamps so affixed shall be evidence of the tax imposed.

In the case of cigarettes contained in individual packages, as distinguished from cartons or larger units, the stamps shall be affixed securely on each individual package.

§82.24.070

Compensation of dealers. Wholesalers and retailers subject to the provisions of this chapter shall be allowed compensation for their services in affixing the stamps herein required a sum equal to three and three-quarters percent of the value of the stamps purchased or affixed by them.

§82.24.080

Legislative intent. It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed,

handled, or distributed in this state.

§82.24.090

Records to be preserved—Reports. Every wholesaler or retailer subject to the provisions of this chapter shall keep and preserve for a period of five years an accurate set of records, showing all transactions had with reference to the purchase and sale of any of the articles taxed herein and such persons shall also keep separately all invoices, and shall keep a record of all stamps purchased, and all such records and all stock of taxable articles on hand shall be open to inspection at all reasonable times by the tax commission or its duly authorized agent.

All wholesalers shall within fifteen days after the first day of each month file with the tax commission a report of all drop shipment sales made by them to retailers within this state during the preceding month, which report shall show the name and address of the retailer to whom the cigarettes were sold, the kind and quantity, and the date of delivery thereof.

§82.24.100

Forgery or counterfeiting of stamps — Penalty. To forge or counterfeit any stamp of the kind herein provided is a felony.

§82.24.110

Other offenses — Penalty. Each of the following acts is a gross misdemeanor and punishable as such:

(1) To sell, except as a registered wholesaler or retailer engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(2) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

(3) For any person other than the tax commis-

sion or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(4) To violate any of the provisions of this chapter;

(5) To violate any lawful rule or regulation made and published by the tax commission;

(6) To use any stamps more than once;

(7) To refuse to allow the tax commission or any duly authorized agent thereof, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(8) For any retailer, except one permitted to maintain an unstamped stock to engage in interstate business as provided herein; to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

(9) For any person to make, use, or present or exhibit to the tax commission or any duly authorized agent thereof, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(10) For any wholesaler or retailer or his agents or empolyees to fail to produce on demand of the tax commission all invoices of all the articles herein taxed or stamps bought by him or received in his place of business within five years prior to such demand unless he can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond his control;

(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of

unstamped cigarettes do so to avoid payment of the tax imposed herein.

All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses herein described shall be guilty and punishable as principals, to the same extent as any wholesaler or retailer violating the provisions thereof.

§82.24.120

Violations — Penalties and interest. If any person, subject to the provisions of this chapter or any rules and regulations promulgated by the tax commission under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules and regulations promulgated by the tax commission in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a penalty equal to the amount of any tax found to be due plus interest thereon at the rate of one percent for each thirty days or portions thereof from the date the tax became due, and upon notice mailed to the last known address of the taxpayer said amount shall become due and payable in ten days, at which time the commission or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes and penalties. The commission, for good reason shown, may remit all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate of one percent for each thirty days or portion thereof. The keeping of any unstamped articles coming within the provisions of this chapter shall be prima facie evidence of intent to violate the provisions of this chapter.

§82.24.220

Vending machines — Certificates. Every person in this state who by means of a vending machine sells any of the articles taxed herein shall be required before engaging in such business to apply to and obtain from the tax commission a certificate to engage in business as a retailer, and shall obtain a separate certificate for each machine used in vending or selling any of the articles taxed herein and each machine so used shall be considered a separate place of business. Any articles taxed herein vended by means of any such machine shall bear stamps as evidence that the tax herein imposed has been paid and the articles taxed herein contained in such machines shall be available for inspection by the commission or its duly authorized agents at all times.

§82.24.900

Construction. The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.

§82.32.300 Rule-Making Power of Tax Commission.

Tax commission to administer. The administration of this and chapters 82.04 through 82.28 of this title is vested in the tax commission which shall prescribe forms and rules of procedure for the determination of the taxable status of any person, for the making of returns and for the ascertainment, assessment and collection of taxes and penalties imposed thereunder.

The tax commission shall make and publish rules and regulations, not inconsistent therewith, necessary to enforce their provisions, which shall have the same force and effect as if specifically included therein, unless declared invalid by the judgment of a court of record not appealed from.

The commission may employ such clerks, specialists, and other assistants as are necessary. Salaries and compensation of such empolyees shall be fixed by the commission and shall be charged to the proper appropriation for the commission.

The commission shall exercise general supervision of the collection of taxes and, in the discharge of such duty, may institute and prosecute such suits or proceedings in the courts as may be necessary and proper.

Regulations of the Washington State Tax Commission:

Washington State Tax Commission Letter Regulation of July 20, 1965:

Date: July 20, 1965

To:

Subject: Cigarette Tax on Sales to Indians

The Tax Commission has recently learned of several instances in which Indians conducting businesses upon Indian Reservations are selling cigarettes to which the State of Washington Cigarette Stamps have not been affixed. There is evidence that such unstamped cigarettes are being sold to both Indians and non-Indians.

You are hereby informed that the sale, handling or distribution of cigarettes by Washington distributors to Indians, including sales for resale on an Indian Reservation, are subject to the Cigarette Tax of 11 cents per package. Distributors and wholesalers of cigarettes will be liable for purchasing and affixing the required stamps upon all cigarettes so sold, and upon failure to do so will become liable for the penalties provided in RCW 82.24.-110, 120 and 130.

In support of this ruling, your attention is directed to RCW 82.24.080: "It is the intent and purpose of this Chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, *handled, or distributed within this state and to collect the tax from the person who first*

sells, uses, consumes, *handles or distributes them in the state.*" (italics supplied)

This ruling does not affect the exemption allowed in respect to sales made directly to U. S. Government departments or agencies nor in respect to sales made in interstate or foreign commerce.

Since this matter has not been ruled on previously by the Tax Commission, the tax will be applicable prospectively from the date of this bulletin and will not apply in respect to any prior transactions.

TAX COMMISSION OF THE STATE
OF WASHINGTON

SUPREME COURT, U. S.

FILED

MAY 1 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1968

No. [redacted] 52

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, *Appellants*

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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Attorney General for the State of Washington,

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Attorneys for Appellee,
Tax Commission of the
State of Washington.

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1967

No. 1280

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, *Appellants*,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE

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October Term, 1967

No. 1280

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, *Appellants*,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee Tax Commission of the State of Washington respectfully moves that this Court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question.

QUESTION PRESENTED

Can a state impose upon cigarette wholesalers who are generally subject to its jurisdiction an excise tax measured by the total number of cigarettes handled, or does the Indian Commerce Clause require a deduction for those cigarettes which are eventually sold by a retailer within the boundaries of an Indian reservation?

COUNTER-STATEMENT OF THE CASE

The cigarette tax of the state of Washington is of the type, now widely adopted by the various states, which is normally paid to the state by the wholesale seller of cigarettes. His liability is established when he is the first person to sell, use, consume, handle or distribute the cigarettes in the state. The amount of the tax is determined by the number of cigarettes involved.

This tax is paid by the purchase of cigarette tax stamps by the wholesaler from the state, or by the remittance to the state of the amount indicated on an authorized metered stamping machine in the possession of the wholesaler. Payment is enforced by statutory prohibitions against the sale of cigarettes not bearing a stamp, or other authorized indicia of payment.

In this action, the Makah Indian Tribe sought to obtain a judgment declaring that this tax, to the extent that it is measured by cigarettes which are

eventually sold by a retail seller to the Tribe itself, or to any of its members, on the Makah Indian Reservation, violates the constitutions of the United States and of the State of Washington.

ARGUMENT

There is no federal question presented in this case which is sufficiently substantial to merit the attention of this Court. Basically, the only issue involved is whether the State of Washington has the power to impose a tax upon persons doing business within its borders and outside of any possible enclave removed from its jurisdiction. This power is an adjunct to the sovereignty of each of the several states, and has been upheld in its exercise without question of its existence.

It is, admittedly, not an unrestricted power. There are persons, things and activities which are not subject to a particular state's taxing power. Among the limitations on that power are those resulting from the grant to Congress of the power to regulate commerce with the Indian tribes, contained in Article I, section 8, clause 3 of the Federal constitution. This grant, the appellant has asserted, removes the cigarette wholesaler, at least partially, from the taxing power of the State of Washington. The cigarette wholesaler, however, is not an Indian. He is not an Indian trader licensed by the Secretary of the Interior. He does not sell to any licensed Indian traders. He is not doing any business at all on

any Indian reservation. The only business he does is selling and distributing cigarettes, outside of the confines of any Indian reservation, to retail dealers, some of whom maintain outlets on Indian reservations. We submit respectfully that he is not involved in Indian commerce, and that, therefore, a tax upon him does not present a federal question.

If the wholesaler himself is not directly so engaged, the appellant urges that this tax upon him indirectly imposes a burden which would disarrange the statutory plan to protect the Indian from unfair prices, and which would, therefore, render the tax unconstitutional.

Language in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) is relied upon by the appellant to establish this indirect "burden" theory. In fact, that case dealt with a tax which, as a charge upon retail sales, was a *direct* burden upon the transactions between a licensed Indian trader and his Indian customers. Appellant has cited no authority, and this appellee is satisfied that in fact there is none, invalidating state legislation because of effects resulting indirectly from its application. This Court has, in fact, held that the Indian consumer is not insulated from the common economic burden in *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935).

The state is, then, accused of attempting indirectly to enter the federally-occupied field of price

control in Indian trade. In defense, it submits that its only effort is entering directly the unoccupied field of taxation of cigarette wholesalers. Although this tax may result ultimately in an increase in the price of goods to a constitutionally protected consumer, that fact alone does not convert the tax into an invalid burden upon such a consumer. If the price increase does constitute a federal question, and this appellee submits that in this case it does not, the decision of this Court in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), has, by deciding it, deprived that question of its substance.

CONCLUSION

The incidence of the tax involved in this case does not, legally or factually, fall upon an Indian, Indian tribe, or Indian trader. It does fall only upon individuals unquestionably subject to the taxing jurisdiction of the State of Washington. This appellee respectfully submits that the application of this tax in this manner presents no substantial federal question. Further, it is submitted that the imposition of excise taxes upon one not standing in the stream of Indian commerce ultimately has a collateral economic effect upon such commerce, but that this effect is too indirect and remote to create a federal question of substance. This appellee urges, therefore, that this appeal be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General for the State of Washington,

TIMOTHY R. MALONE,
Assistant Attorney General,

J. RICHARD DUGGAN,
Assistant Attorney General,

Attorneys for Appellee.

LIBRARY
SUPREME COURT, U. S.

No. [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1968

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, APPELLANTS

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, TAX COMMISSIONER AND CHAIRMAN OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, AND JANE DOE KINNEAR, HIS WIFE; G. MERTON DICK, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE DICK, HIS WIFE; CLARK SQUIRE, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE SQUIRE, HIS WIFE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,

CLYDE O. MARTZ,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1280

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, APPELLANTS

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, TAX COMMISSIONER AND CHAIRMAN OF THE TAX COMMISSION OF THE STATE OF WASHINGTON, AND JANE DOE KINNEAR, HIS WIFE; G. MERTON DICK, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE DICK, HIS WIFE; CLARK SQUIRE, TAX COMMISSIONER OF THE STATE OF WASHINGTON, AND JANE DOE SQUIRE, HIS WIFE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of May 20, 1968, inviting the Solicitor

General to state the views of the United States with respect to the case.

The State of Washington imposed an excise tax upon the "sale, use, consumption, handling or distribution" of cigarettes which is collected by the use of stamps which are affixed to the package by wholesalers or distributors (Pet. App. D 10-16). The appellant, the Makah Indian Tribe, contests that tax as applied to cigarettes ultimately sold by retailers within the Makah Indian Reservation. The trial court and the Supreme Court of Washington have refused to enjoin collection of the tax, holding that when the tax is imposed the cigarettes are in the hands of wholesalers conducting business wholly outside the Indian Reservation and that it was not specifically directed at trading on the Indian Reservation and had no substantial effect on such trading. These circumstances, the court held, distinguished *Warren Trading Post* v. *Tax Commission*, 380 U.S. 685.

It does not appear that the power here asserted by the State of Washington conflicts in any way with the authority exercised by the Secretary of the Interior over Indian Reservations, nor would it impose any direct burden on trading in the Reservation. As this Court noted in *Warren*, *supra*, at 690, n. 14, the federal statutes and regulations as to Indian traders apply "only to activities on reservations." Here the tax is imposed on wholesalers, who are engaged in business outside the reservation. We do not believe that the subsequent transfer of some of the cigarettes to retailers upon the Reservation for sale to Indians or non-Indians invalidates the tax. Analogies refus-

ing to extend the federal immunity from state taxation to instances where the economic burden of a tax might be passed on to the government would seem to support the decision in this case. *E.g.*, *Penn Dairies* v. *Milk Control Comm'n. of Pennsylvania*, 318 U.S. 261; *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9. See, also, *United States* v. *Boyd*, 378 U.S. 39.

Accordingly, we submit the Court might appropriately dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

JUNE 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 310311 833

PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MAKAH INDIAN TRIBE *v.* TAX COMM'N OF STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 52. Decided October 14, 1968.

PER CURIAM.

The motion is dismiss is granted and the appeal is dismissed for want of a substantial federal question.